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Supreme Court, U.S.
FILED

101223 APR 6 - 2011

OFFICE OF THE CLERK

No. 10-

IN THE

Supreme Court of the United States

KEVIN P. CURRY,

Petitioner,

v.

MARGARET MARSHALL, *ET AL.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. WHETHER THE FIRST CIRCUIT ERRED IN DISMISSING THE COMPLAINT BASED ON THE *ROOKER-FELDMAN* DOCTRINE BECAUSE THE PETITIONER WAS NOT AFFORDED NOTICE AND AN OPPORTUNITY TO BE HEARD IN THE STATE COURT CASE ON THE MAJOR ISSUE.

2. WHETHER PETITIONER IS ALLOWED TO CHALLENGE A STATE COURT DECISION IN THE FIRST CIRCUIT WHERE THE ISSUE ON APPEAL HAD PREVIOUSLY BEEN DECIDED BY THIS COURT IN THE CASE OF *IN RE RUFFALO* AND THE FEDERAL CLAIM DID NOT ARISE UNTIL AFTER THE STATE COURT DECISION HAD BEEN ISSUED.

3. WHETHER IN A QUASI-CRIMINAL CASE PETITIONER IS ALLOWED, SIMILAR TO AN INCARCERATED PERSON SEEKING A WRIT OF *HABEAS CORPUS*, TO CHALLENGE A STATE COURT DECISION IN THE FIRST CIRCUIT WHERE THE STATE COURT DID NOT AFFORD PETITIONER NOTICE AND AN OPPORTUNITY TO BE HEARD.

PARTIES TO THE PROCEEDINGS

1. Kevin P. Curry, Plaintiff and Petitioner

2. Margaret Marshall, Chief Justice, Defendant and Respondent

3. Francis X. Spina, Justice, Defendant and Respondent

4. Martha Coakley, Attorney General, Defendant and Respondent

5. Roderick L. Ireland, Justice, Defendant and Respondent

6. Robert J. Cordy, Justice, Defendant and Respondent

7. Judith A. Cowin, Justice, Defendant and Respondent

8. Margot Gardner Botsford, Justice, Defendant and Respondent

9. Ralph D. Gants, Justice, Defendant and Respondent

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeal for the First Circuit for the reasons stated below:

OPINIONS BELOW

First Circuit affirmance: App A. District Court decision dismissing Petitioner's § 1983 claim for lack of subject matter jurisdiction: App B.

JURISDICTION

On January 22, 2010, the Plaintiff/Petitioner brought suit against the Defendants in the United States District Court of Massachusetts, alleging that the Defendants had violated the Plaintiff/Petitioner's constitutional rights under 42 U.S.C. § 1983 and all relevant sections, §§ 1333, 1343, 1367, *et seq.* Venue was properly within the District Court, pursuant to 18 U.S.C. § 1965, *et seq.* On September 28, 2010, at a pre-trial hearing the Hon. Nathaniel Gorton dismissed the case based on the *Rooker-Feldman* doctrine and found that *In Re Ruffalo*, 390 U.S. 544, 88 S. Ct. 1222, 20 L. Ed. 2d 117 (1967) was inapplicable to the facts at bar. On October 10, 2010, the Plaintiff/Petitioner appealed the dismissal of his Complaint to the U.S. Court of Appeals for the First Circuit. The District Court Judge entered an oral opinion stating that there were no written findings. On February 8, 2011, the First Circuit Court of Appeals issued a judgment affirming the dismissal under *Rooker-Feldman* grounds. The jurisdiction of this Court to review the Judgment of the First Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Due Process Clause of the United States Constitution reads: "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend XIV, § 1.

STATUTES INVOLVED

42 U.S.C. § 1983 and all relevant sections.

STATEMENT OF THE CASE

Petitioner – and attorney of over 40 years experience without any prior disciplinary matters – was disbarred as a result of his conduct in an investigation for the losing side of what has been dubbed "the Demoulas litigation." *In Re Curry*, 450 Mass. 503, 880 N.E. 2d. 388 (2008), *Demoulas v. Demoulas*, 424 Mass. 502, 677 N.E.2d 159 (1997), *Demoulas v. Demoulas*, 428 Mass. 543, 703 N.E.2d 1141 (1998), *Demoulas v. Demoulas*, 432 Mass. 43, 732 N.E.2d 875 (2000). Gary Crossen was also disbarred for his role in that matter. *In Re Crossen*, 450 Mass 533, 880 N.E.2d 352 (2008). Another attorney, Richard Donahue, was suspended for three years.

Petitioner commenced an action in federal court seeking relief from the disbarment. He asserted that his constitutional rights were violated because he was denied the right of confrontation, the *ex post facto* doctrine was violated, and he was denied his right to notice of the charges against him. The State Court used the charge that Petitioner intended to harm another as a partial basis for its actions, even though he was acquitted of that

charge. Petitioner sought restoration of his license or, in the alternative, a hearing on the issues on which he was not given notice, but which were nevertheless relied upon in the State Decision to disbar him.

Petitioner demonstrated that the issues relied upon by Bar Counsel as the basis for disbarring Petitioner were not the same as those decided by the State Court. The State Court used new issues on Appeal, which had never been tried. Petitioner had never been provided notice of certain charges or the opportunity to defend against them. At the time of the 1995 investigation, the Petitioner's actions in the investigation were lawful and there was no prohibition against an attorney conducting such an investigation. See *In Re Norman Zalkind*, 872 F.2d 1, 11 (1st Cir. 1989) (RA-27); *U.S. v. Cooper*, 675 F. Supp. 753 (D. R.I. 1987). Petitioner was nevertheless punished for conduct that was lawful when it took place, in violation of the *ex post facto* doctrine.

Petitioner also demonstrated that, under this Court's decision in *In Re Ruffalo*, *supra*, he had a proprietary right in his law license, and that it could not be taken from him without due process of law. Disbarment cases are quasi-criminal in nature. See *Dailey v. Vought Aircraft Co.* 141 F.3d 224, 229, (5th Cir. 1998); *In Re Thalheim*, 853 F.2d 383 (5th Cir. 1988) ("attorney disbarment and suspension cases are quasi-criminal in character") *In Re Medrano*, 956 F.2d 101, 102 (5th Cir. 1992) ("A disbarment proceeding is adversarial and quasi-criminal in nature and the moving party bears the burden of all elements of a violation.") At a minimum, he was entitled to notice of the charges against him and an opportunity to be heard.

In *Ruffalo*, this Court held that:

> We turn then to the question whether, in Ohio's procedure, there was any lack of due process. Disbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer. *Ex parte Garland*, 4 Wall,333, 380; *Spevack v. Klein*, 385 U.S. 511,515. He is accordingly entitled to procedural due process, which includes fair notice of the charge. See *In re Oliver*, 333 U.S. 257, 273. It was said in *Randall v. Brigham*, 7 Wall, 523, 540, that " when proceedings for disbarment are "not taken for matters occurring in open court, in the presence of the judges, notice should be given to the attorney of the charges made and opportunity afforded him for explanation and defense." Therefore, one of the conditions this Court considers in determining whether disbarment by a state should be followed by disbarment here is whether "the state procedure from want of notice or opportunity to be heard was wanting in due process." *Selling v. Radford*, 243 U.S. sec.46,51. In the present case, petitioner had no notice that his employment of Orlando would be considered a disbarment offense until after both he and Orlando had testified at length on all the material facts pertaining to this phase of the case. As Judge Edwards, dissenting below, said "Such procedural violation of due process would never pass muster in any normal civil or criminal litigation." 370 F. 2d, at 402.

> These are adversary proceedings of a quasi-criminal nature. Cf. *In re Gault*, 387 U.S. 1, 33. The charge must be known before the proceedings commence. They become a trap when, after they are underway, the charges are amended on the basis of testimony of the accused. He can then be given an opportunity to expunge the earlier statements and start afresh. How the charge would have been met had it been originally included in those leveled against petitioner by the Ohio Board of Commissioners on Grievance and Discipline no one knows.

As detailed below, these principles were violated here.

A reading of the State Court decision and examination of the charges as set forth below demonstrates there was no notice and opportunity to be heard on the major issue for which Petitioner was disbarred. The Massachusetts decision, *In Re Curry*, 450 Mass. 503, 880 N.E.2d 388 (2008) begins:

> Although unsuccessful, the ruse, which we describe below caused needless embarrassment to a judge, an attorney and their respective families...." Curry told his hosts what they were apparently eager to hear: Judge Lopez had decided the shareholder derivative case against them before opening statements in the case. Specifically, he told them among other things, that the case was "over before it began." He proceeded to make salacious and disparaging remarks about Judge Lopez's character on and

> off the bench, and also about the character of the Plaintiff's attorneys. Curry told Telemachus and the others that Judge Lopez had previously done "a big favor" for another individual in a "big case." Curry told them that their case was "fixed." However, at the time he made this presentation, Curry, in the words of the special hearing officer "had documentation to support any of his scurrilous charges."

Curry, 450 Mass. at 506-510, 880 N.E.2d at 392-395. The court continues:

> His misconduct began with baseless insinuations to the Telemachus Demoulas family that he knew Judge Lopez was predisposed against them and that he could gather other evidence of the Judge's misconduct.

Curry, 450 Mass. at 522, 880 N.E.2d at 403. The court goes on:

> *Harm to the administration of justice.* Curry's conduct was self-evidently "prejudicial to the administration of justice," in violation of DR 1-102 (A) (5), for at least two reasons. First... was to discredit and thereby disqualify Judge Lopez in an ongoing matter, even though *he had no credible evidence of any kind to suspect Judge Lopez of a scintilla of bias against the defendants or of any other judicial misconduct.* 525, 405

Curry, 450 Mass. at 525, 880 N.E.2d at 405 (emphasis supplied).

Meanwhile, the charges against Petitioner were radically different, and provided no notice of the issues upon which the State Court based its decision:

COUNT I: INVESTIGATION

60. The respondent Kevin Curry's conduct in devising and participating in a scheme to induce a law clerk under false pretenses into disclosing confidential communications with a judge regarding the decision-making process in a case violate Canon One, Disciplinary Rules 1-102(A)(2) and (4)-(6), and Canon Seven, Disciplinary Rule 7-102(A)(5) and (7), set forth in paragraph 148 below.

61. The respondent Kevin Curry's conduct on behalf of a client in holding out to a former law clerk the false promise of a lucrative employment involving the international practice of law for a sham multinational corporation, in falsely representing the respondent's identity and the identity of his associates, and in luring the former law clerk out of the Commonwealth on the false pretext of a job interview for the purpose of inquiring into the deliberative processes of a judge in a case tried before her violated Canon One, Disciplinary Rules 1-102(A)(2) and (4)-(6), and Canon Seven, Disciplinary Rules 7-102(A)(5) and (7), as set forth in paragraph 148 below.

62. The respondent Kevin Curry's conduct inquiring into the details of the personal life of a former law clerk and of the judge for whom he clerked in order to gain potentially damaging personal information for use in a pending legal matter violated Canon One, Disciplinary Rule 7-102(A)(2), (5) and (6) and Canon Seven, Disciplinary Rule 7-102(a)(1) and (7) as set forth in paragraph 148 below.

COUNT II: NEW YORK

102. Curry's conduct in planning executing and or participating in a scheme to induce former law clerk to travel to New York under the pretext of a job interview in order to tape a conversation with him without his knowledge and consent violated Canon One, Disciplinary Rules 1-102(A)(2) and (4)-(6) and Canon Seven Disciplinary Rules 7-102(A)(5) and (7) as set forth in paragraph 148 below.

103. Curry's conduct in planning executing and/or participating in a scheme to induce a former law clerk to make damaging or compromising statements about himself or about how the judge for whom he clerked with the false inducement of a lucrative employment as in house counsel handling an international practice in order to force the judge's recusal or undermine her decision in an on-going case violated

> Canon 1-102 A (2) and 4-6 and Canon 7 Disciplinary Rule 7-103 A (5) and (7) in paragraph 150.

At the hearing, the Plaintiff/Petitioner testified about a private meeting he had with his clients. The State Court used this testimony as support for its disbarment order. However, the Plaintiff was never charged with any misconduct based on private statements to his client in the Petition for Discipline. It only became an issue and the Petitioner learned of it for the first time when the State Court issued its decision:

> *Curry*:
>
> A. To support the proposition that the Demoulas case began in Tony Pelusi's office over small criminal matters that were well taken care of, were sharpened, wound up at Davis Malm, was over from the beginning, and acts of judicial misconduct conducted by Judge Lopez let me finish—and that the people that brought it in at Davis Malm had serious financial and personal problems that warranted them to do what they did.
>
> *Bar Counsel*:
>
> Q. What did you understand or what are you intending to communicate by the phrase over from the beginning?
>
> *Curry*:
>
> A. That the case was over before it began.

Bar Counsel *then went on to a different issue*:

Bar Counsel:

Q. That the case was decided before it was ever tried, is that what you mean?

Curry:

A. Yes, Maam.

Petitioner was acquitted of one charge, as he had an objective motive to disqualify Judge Lopez, and his actions were not undertaken to harass or maliciously injure or harm another. The Special Hearing Officer found that the former court clerk's denials that he informed Petitioner that Judge Lopez was biased were insincere:

> **1) BECAUSE I FIND CURRY'S INQUIRIES HAD AN OBJECTIVE-DISQUALIFYING JUDGE LOPEZ AND THEREFORE WAS NOT TAKEN MERELY TO HARASS OR MALICIOUSLY INJURE ANOTHER.**
>
> Walsh admitted he told Curry and LaBonte that he had written the entire Demoulas decision, but he denied making any statements about Judge Lopez's thinking on the case or that she was predisposed. I do not credit Walsh's testimony on this point. I find that he did tell Curry and LaBonte that Judge Lopez was biased and predisposed to the Plaintiff. In the Supplemental Affidavit Walsh drafted after he learned of the ruse, he recounted that Crossen

> had told him Walsh had told several people that Judge Lopez was biased during the trial. In that Affidavit, Walsh reported his response to Crossen that he had made those statements
>
> * * * *
>
> I find that based on Curry and LaBonte's testimony in their notes, as well as Walsh's statement and his supplemental Affidavit, that he told Curry and LaBonte that Judge Lopez was biased. I also find that Walsh told Curry and LaBonte that Judge Lopez told him before the trial began who " the good guys and bad guys were" and "who the winners and losers were going to be."

See page 506 Hearing Officer's decision.

As described above, Petitioner commenced an action in United States District Court of Massachusetts seeking reinstatement of his law license or, in the alternative, a hearing on the issues on which he was never given notice, but which were nevertheless relied upon in the State Decision to disbar him. The District Court (Gorton, J.) dismissed the case pursuant to the *Rooker-Feldman* doctrine, and found that *In re Ruffalo* did not apply to the facts of this matter. The First Circuit summarily affirmed, concluding that the District Court properly dismissed this suit on *Rooker-Feldman* grounds. The First Circuit did not address the applicability of *In re Ruffalo*.

REASONS FOR GRANTING PETITION

I. THIS CASE IS AN EXCEPTION TO THE *ROOKER-FELDMAN* DOCTRINE BECAUSE THE PLAINTIFF WAS DENIED A REASONABLE OPPORTUNITY TO ASSERT THE CLAIM IN STATE COURT AND THIS IS A CASE OF FIRST IMPRESSION.

Rooker-Feldman is a judge-made doctrine that interprets federal jurisdictional statutes and establishes a general principal that lower federal courts, with some exceptions, have no jurisdiction to review state court judgments. See *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S. Ct. 149, 68 L. Ed. 362 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 103 S. Ct. 1303, 75 L. Ed. 2d 206 (1983); *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280, 284, 125 S. Ct. 1517, 161 L. Ed. 2d 454 (2005). The statutory grounds are 28 U.S.C. § 1257. See also 28 U.S.C. §§ 1331, 1334.

The limits are statutory. Congress has the power to create exceptions, which they have done. See, e.g. 28 U.S.C. § 2254 (*habeas-corpus).* There are also various exceptions in the bankruptcy code or ERISA. See, e.g. 29 U.S.C. § 1132. Inherent in the doctrine, however, is the right of the United States Supreme Court to create exceptions, and that such litigation may be appealed to the highest Court. The normal manner would be to appeal from the State Court judgment and then to this Court. In this case, there is no direct appeal to this Court, since the *In re Ruffalo* issue has already been decided by this Court.

As stated in *Moore's Federal Practice*, Third Edition, Vol. 18, 133-34.17:

> In *Exxon Mobil*, the Supreme Court stated that the *Rooker-Feldman* doctrine does not bar federal lower-court jurisdiction 'simply because a party attempts to litigate in federal court a matter previously litigated in state court.' (47) Accordingly, it appears that the *Rooker-Feldman* doctrine should not apply to bar a claim that the federal plaintiff did not litigate in state court, at least when the plaintiff was denied a reasonable opportunity to assert the claim in state court.(48)
>
> (47) **Rooker-Feldman doctrine does not bar jurisdiction simply because claim was previously litigated in state court.** *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544, U.S. 280, 293, 125 S. Ct 1517,161 L. Ed. 2d. 454 (2005) (although Rooker-Feldman doctrine does not bar federal jurisdiction, principles of claim preclusion or issue preclusion may prevent relitigation in federal court of claim already litigated in state court).
>
> (48) **Rooker-Feldman doctrine does not bar claim that federal plaintiff could not litigate in state court.** *See Beth-El All Nations Church v. City of Chicago*, 486 F.3d 286,292 (7th Cir. 2007) (Rooker-Feldman doctrine "applies to bar federal claims that are 'inextricably intertwined' with a state-court judgment, except where (because of state-court rules or

> procedures) the plaintiff lacked a reasonable opportunity to present those claims in state court."); *Cervantes v. City of Harvey*, 373 F. Supp.2d 815, 820 (N.D. Ill. 2005) ("*Exxon Mobil* reiterated the 'independent claim' exception to the *Rooker-Feldman* doctrine... However, a claim is considered 'independent' only when there was no reasonable opportunity' to raise the claim in the state court proceeding.") *cf. Kelley v. Med-1 Solutions*, LLC, 548 F.3d 600, 606-607 (7th Cir. 2008) (limited jurisdiction of state small-claims court did not deprive party of "reasonable opportunity" to litigate federal claim, since party had option to transfer case to state court's plenary docket) see generally Thomas D. Rowe, Jr & Edward L. Baskauskas, *"Inextricably Intertwined" Explicable at Last*? Rooker-Feldman *Analysis After the Supreme Court's* Exxon Mobil's *Decision*, 2006 Fed. Cts. L. Rev.1- 23-24 (May 2006), www.fclr.org/2006fedctslrev1.htm. But *see Kelley v. Med-1 Solutions, LLC*, 548 F.3d 600,607 (7th Cir.2008) (questioning post-*Exxon Mobil* viability of "reasonable opportunity" exception to Rooker-Feldman doctrine) (dictum).

The reason for this principle is that federal courts believe that parties in state court should raise and litigate all of their claims in that forum without resorting to the use of the federal courts as a *de facto* appellate court:

> One obvious reason is that when a state judicial proceeding does occur, federal judges usually say the parties ought to raise all of their claims,

> defenses and objections. If the parties do, and are permitted to litigate the issues, the judges think that should ordinarily settle the matter, subject to *certiorari* review in the Supreme Court; and if they don't, they should not later come and complain to the federal courts. There are pluses and minuses to this approach but, with some exceptions, it has carried the day so far, and it does so here as to the Clenbuterol case.

Maymo-Melendez v. Alvarez-Ramirez, 364 F.3d 27, 33 (1st Cir. 2004).

Here, however, Petitioner did not fail to litigate a claim, defense, or objection in the state court and then resort to federal court. Rather, Respondents deprived Petitioner of the ability to litigate all of the issues in the state court. It is clear from the evidence that the Plaintiff/ Petitioner was not afforded notice of the main charge against him, i.e. statements to the Demoulas family that the case was "fixed". This is a new and independent claim and the District Court had jurisdiction, since the issue of "his right to notice and the opportunity to be heard" had been previously decided by the U.S. Supreme Court in *In Re Ruffalo, supra*. Accordingly, this Petition should be granted.

II. PETITIONER WAS BARRED FROM A DIRECT APPEAL TO THIS COURT UNDER THIS COURT'S RULE 10: CONSIDERATION GOVERNING REVIEW ON WRIT OF CERTIORARI BECAUSE THE ISSUE ON APPEAL WAS DECIDED BY THIS COURT IN THE CASE OF *IN RE RUFFALO*.

The state court judgment, *In Re Curry*, *supra* clearly violated the *Ruffalo* rule, as Petitioner was denied notice and the opportunity to be heard on the major issue – his alleged statements to the Demoulas family that the case was "fixed". The Massachusetts Supreme Court held that he had no evidence of same. See *In Re Curry*, 450 Mass. at 509-512, 522, 880 N.E. 2d at 394-397, 403. Clearly reading the charges, which are akin to an indictment as this is a quasi-criminal case, Petitioner was never charged with making these alleged statements as a basis to lose his law license. Only upon reading the decision did he learn that these statements were an issue.

Rule 10. *Considerations Governing Review on Writ of Certiorari* states:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari is granted only for compelling reasons. The following, although neither controlling not fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> > (a) a United States Court of Appeals has entered a Decision in conflict with the decision of another United

> States Court of Appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided and important federal question in a way that conflicts with relevant decisions of this Court.
>
> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

This is an independent claim, brought in the district court, seeking a determination that Massachusetts did not follow mandated U.S. Supreme Court law by not giving the

Petitioner notice and the opportunity to be heard. *Exxon, supra* was a case in which a federal action began prior to the state court judgment and might be described as an "insurance policy". See footnote 20-3, *Moore's Federal Practice, Third Edition.*

However, in the instant case, the federal claim did not become known until the state court decision had been made and Petitioner could hardly apply to the U.S. Supreme Court to decide *Rufallo* since it had been decided in 1967. The Petitioner could not commence an action against the Massachusetts Supreme Court, alleging that it would, in the future, violate mandated U.S. Supreme Court law. Accordingly, this Petition should be granted.

III. THIS IS A QUASI-CRIMINAL CASE THAT SHOULD BE TREATED SIMILARLY TO A REQUEST FOR A WRIT OF *HABEAS CORPUS* BY AN INCARCERATED PERSON.

Section 2254 of Title 28 provides as follows:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

* * * *

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Rooker-Feldman is judge-made law. The criteria stated in § 2254(d) are met in this case. While Petitioner is not incarcerated, his law license is being held hostage by Respondents, and he has been unjustly deprived of a valuable property right and the means to earn a living without due process. This Court should take this case and determine that in quasi-criminal cases such as this, the absence of notice of the charges and a meaningful opportunity to be heard violates the United States Constitution. Accordingly, this petition should be granted.

CONCLUSION

For the foregoing reasons, this Court should grant this Petition.

Respectfully Submitted,

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APPENDIX A — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT, FILED FEBRUARY 8, 2011

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 10-2224

KEVIN P. CURRY,

Plaintiff, Appellant,

v.

MARGARET MARSHALL, Chief Justice, et al.,

Defendants, Appellees.

Before

Boudin, Lipez and Thompson,
Circuit Judges.

JUDGMENT

Entered: February 8, 2011

Appellant Kevin Curry ("Curry") appeals from the district court's decision dismissing his section 1983 action for lack of subject matter jurisdiction. The appellees have moved for summary disposition.

Appendix A

In his federal court action, Curry challenged his disbarment from the practice of law in Massachusetts and sought reinstatement of his license to practice. The district court premised its decision to dismiss the suit on the *Rooker-Feldman* doctrine, which prohibits federal district courts from asserting jurisdiction over "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005). After careful review of the parties' arguments and the record in this case, we conclude that the district court properly dismissed this suit on *Rooker-Feldman* grounds. Accordingly, we affirm.

Affirmed. See 1st Cir. Loc. R. 27.0(c).

By the Court:

/s/_____
Margaret Carter, Clerk.

cc:
Kathleen M. Curry
Timothy J. Casey

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT, DISTRICT OF MASSACHUSETTS, FILED SEPTEMBER 28, 2010

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION
NO. 10-10142-NMG

KEVIN CURRY,

Plaintiff

v.

MARGARET MARSHALL, Chief Justice, et al.,

Defendant

Order of Dismissal
September 28, 2010

Gorton, D. J.

In accordance with the Courts oral order granting defendants motion to dismiss (Docket No. 15) during hearing held this date; it is hereby Ordered this case is Dismissed.

Approved,

/s/
Nathaniel M. Gorton
United States District Judge

By the Court,

/s/
Craig J. Nicewicz
Deputy Clerk

APPENDIX C — TRANSCRIPT ON HEARING ON MOTION TO DISMISS IN THE UNITED STATES DISTRICT COURT, DISTRICT OF MASSACHUSETTS, DATED SEPTEMBER 28, 2010

[1] UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CA No. 10-10142-NMG

KEVIN P. CURRY,

Plaintiff,

vs.

MARGARET MARSHALL, et al,

Defendants.

BEFORE: THE HONORABLE NATHANIEL M. GORTON

HEARING ON MOTION TO DISMISS

John Joseph Moakley United States Courthouse
Courtroom No. 4
One Courthouse Way
Boston, MA 02210
Thursday, September 28, 2010
2:38 p.m.

Appendix C

Cheryl Dahlstrom, RMR, CRR
Official Court Reporter
John Joseph Moakley United States Courthouse
One Courthouse Way, Room 3209
Boston, MA 02210
Mechanical Steno - Transcript by Computer

[2] APPEARANCES:

Kathleen M. Curry, Esq.
50 Congress Street
Suite 745
Boston, Massachusetts 02109
On behalf of the Plaintiff.

OFFICE OF THE ATTORNEY GENERAL

By: Timothy James Casey, Esq.
One Ashburton Place
Boston, Massachusetts 02108
On behalf of the Defendants.
[3] PROCEEDINGS

THE CLERK: This is Civil Action 10-10142, Kevin Curry vs. Marshall, et al. Will counsel please identify themselves for the record.

MS. CURRY: Good afternoon, your Honor. My name is Kathleen Curry. I represent the plaintiff.

THE COURT: Miss Curry, good afternoon.

Appendix C

MR. CASEY: Good afternoon, your Honor. My name is Tim Casey. I'm an Assistant Attorney General, and I represent the defendants.

THE COURT: Mr. Casey, good afternoon to you. Please be seated, counsel.

This matter was scheduled for both a scheduling conference and a hearing on the defendants' motion to dismiss. And because of the nature of the case, I have convened this to be really a hearing on the motion to dismiss. If we get beyond that matter, then we can worry about scheduling after this.

But it is -- at least it seems clear to the Court that what is being asked of this court is for this judicial officer to review the decision of the Supreme Judicial Court and all the members thereof in connection with the disbarment of Mr. Kevin Curry, who is your client and, I take it, also your brother, is that correct --

MS. CURRY: That is correct, your Honor.

THE COURT: -- Miss Curry? [4] And this is rather an unusual situation that this Court finds itself in. I have a few questions that I would ask of the plaintiff. I'm going to give plaintiff's counsel an opportunity to argue this motion as to why I should not dismiss it.

But before I do, I would ask a few questions of you, Miss Curry. Are you not, plain and simple, asking me to review and overturn a judicial decision of the Supreme

Judicial Court, that is, to reinstate Mr. Curry's license to practice law? And if not, what am I missing? That's the first question.

The second one: Why isn't this case clearly and absolutely barred from this court by the Rooker-Feldman doctrine?

And, finally, because the *Ruffalo* case, which is what you depend upon in your papers, dealt with the question of disqualifying an attorney from practicing in federal court and specifically found that his disbarment from practicing in state court was a question that was "final and is not here on review," why is that decision not completely distinguishable from this case?

MS. CURRY: Thank you, your Honor, for the opportunity to answer those question?

As I was listening, hopefully, intently to your questions, I think that 1 and 2 are basically the same.

THE COURT: Maybe that's a fair assessment.

[5] MS. CURRY: And I believe that centers on -- the Rooker-Feldman question seems to be the crux of this thing, at least in part.

In answering that question, your Honor, I think that we have to look at a little bit of the history of the case of the Rooker-Feldman and a little bit of the history of this case. And I hope I can adequately answer your questions.

Appendix C

Rooker was decided in 1923, *Feldman* in 1983. And in the *Exxon* case, *Exxon vs. Mobil Corporation*, I believe it was Justice Ginsburg who said that there has never been a case since the Rooker-Feldman that has been denied or dismissed for lack of jurisdiction based on this Rooker-Feldman doctrine that is subject of here today.

Going back to *Rooker* and going back to *Feldman*, they involved -- the *Rooker* case involved an issue of a question of an estate court -- excuse me, your Honor. I do have a note on that if you'll just give me a moment.

THE COURT: Sure.

MS. CURRY: I'm sorry, your Honor. Thank you, your Honor, for that.

Rooker dealt really with the validity of a federal statute; and *Feldman* dealt with two young men, I believe, who wanted to be members of the D.C. bar that would not accept their -- validity of their graduation from a nonaccredited law school. And *Exxon* made it very clear that those two cases were [6] limited to those two propositions. And they were very critical of the lower courts in the federal system that had decided to stretch Rooker-Feldman long -- far, far beyond what it was ever meant to do.

The idea that Rooker-Feldman bars this particular case from hearing before this court I believe is in error, and I believe for those reasons that those two cases do not stand for the propositions or govern the case here. This case is also a little bit different.

Appendix C

THE COURT: Yeah. But just before you leave *Exxon*, the court certainly did narrow the Rooker-Feldman doctrine so that federal district courts do not entertain constitutional claims attacking a state court judgment when the basis for the attack was "inextricably intertwined with the state court's judgment in judicial proceedings." How is what you're asking me to do not inextricably intertwined with what the Supreme Judicial Court did?

MS. CURRY: All those cases, *Exxon*, as it defined *Rooker* and *Feldman*, dealt with specific interpretations of statutes as they applied to the state scheme. Here we have something entirely different. What we have here is an absence of constitutional protection.

THE COURT: A what?

MS. CURRY: An absence of constitutional protections to my client. For example, if I may, Mr. Curry was acquitted [7] by the hearing officer of having undertaken making comments in the privacy of his own -- conversations with his own client to hurt the person in question. And the hearing officer said, no, didn't do that. He was acquitted. But if you look at the decision of the Supreme Judicial Court, you'll find that that was a basis for which they used for their ultimate act.

At the time of these actions -- and it's hard to believe that these actions occurred back in 1995 but they did. At the time of that event, the actions of a pretextual investigation were not violative of any rule of the Massachusetts Code

of Professional Conduct. Since that case that may have been changed; but at the time they were done, there was no prohibition against it.

Once again, the Supreme Court took upon itself to say, well, that is a violation so it's a violation of the ex post facto law. You can't make criminal what was not criminal at the time of the actions. You can't impose a punishment on somebody that was not punishable at the time of the actions.

THE COURT: So you're suggesting that the Supreme Judicial Court denied your client of certain federal constitutional rights?

MS. CURRY: Absolutely.

THE COURT: You want me to tell the Supreme Judicial Court that they violated his federal constitutional rights?

MS. CURRY: I believe that you have the authority to [8] do that, your Honor.

THE COURT: Where do I get that authority?

MS. CURRY: You're a federal --

THE COURT: What case gives me that authority?

MS. CURRY: I can't cite to you --

Appendix C

THE COURT: The United States Supreme Court is the only court that can overrule a highest court of a state, aren't they, on constitutional matters?

MS. CURRY: I'm not aware of – I'm not sure I can give you an adequate answer on that, your Honor. I'd like to research it if I could.

THE COURT: I don't know of any, but I'm willing to be educated.

MS. CURRY: I think we all are, your Honor, respectfully.

But going further and a couple more points, my client was denied the confrontation of witnesses. And it's been laid out in the complaint; it's laid out in the brief. He was denied the due process and constitution of violation of witnesses. And that, again, is laid out in the brief and in the complaint.

So, your Honor, I think that these cases -- this case is so unusual, it is so far removed from this Rooker-Feldman defense that has never been used since *Exxon* defined it, to dismiss a case for lack of subject matter jurisdiction. I [9] respectfully ask, your Honor, that this is not the time or the facts of this case to do it with this type of case.

I know you asked me a third question. I have to tell your Honor I don't remember.

THE COURT: It was because *Ruffalo* dealt with the question of disqualifying an attorney from practicing in federal court and specifically found that his disbarment from practicing in the state in question was "final and is not here on review," why that decision isn't completely distinguishable from this case?

MS. CURRY: Well, for example, your Honor, my client has been prohibited from practicing in this court. There was an appeal taken. There was a hearing before Judge Young, and that was the decision that was --

THE COURT: But you're not asking me to review Judge Young's decision. You're asking me to review the decision of the Supreme Judicial Court of the Commonwealth of Massachusetts.

MS. CURRY: I'm asking that, your Honor. I think, also, under the rules, I could also amend my complaint given there's -- a liberal amendment and ask you to do that, to review that.

THE COURT: Okay.

MS. CURRY: But on the other hand, too, *Ruffalo* -- *Ruffalo* says that -- it's a very interesting decision. I've [10] read it many times now. One part of *Ruffalo* says that the actions of the court, earlier court -- and this is a quote from -- I think it's Judge Field (sic) -- that it would not pass muster if it was civil or a criminal case. I think that's pretty telling because of what Justice Douglas writes in that court -- decision, rather -- and they talk about -- he

talks about, rather -- that it's the right of confrontation. And this is a quasi-criminal proceedings in nature; that the court has the right -- or the person involved -- in this case, my client -- has a right to the confrontation of witnesses, all of which he was denied.

So if you are of the mind, your Honor, saying to me that you believe that the Supreme Court cannot be attacked by your rulings here, then I would say to you, respectfully, then I think you ought to let me amend the complaint because it --

THE COURT: To do what?

MS. CURRY: To allow him to practice here.

THE COURT: You mean to appeal the disqualification of Mr. Curry from being able to practice in federal court?

MS. CURRY: Sure. Why not? Of course.

THE COURT: Number 1, that was done by a colleague, one of the judges in this court. If you were going to appeal that, you wouldn't appeal it to me. You would appeal it to the First Circuit Court of Appeals.

MS. CURRY: I could amend my complaint, though, and [11] ask for --

THE COURT: Okay. I'm here to handle what's before me right now. I thank you for your presentation. And I will hear now from the Assistant Attorney General, Mr. Casey.

MR. CASEY: Thank you, your Honor. Your Honor, as we argue in our papers, even though the Rooker-Feldman doctrine has been narrowed by the Supreme Court in the *Exxon, Mobil* case, this complaint still falls within the core of the Rooker-Feldman doctrine as narrowed by the Supreme Court.

In 2008, the Supreme Judicial Court issued a decision disbarring Mr. Curry from the practice of law in Massachusetts. A year later, after the time during which Mr. Curry could have, but apparently did not, seek federal appellate review before the U.S. Supreme Court through a petition for writ of certiorari, he filed a suit in this case seeking effectively the kind of relief that could only be obtained before the U.S. Supreme Court, in this court, your Honor.

So even though the Rooker-Feldman doctrine is less -- is narrower than it was prior to *Exxon, Mobil*, what remains still compels dismissal of this case. In the language of that court case, Mr. Curry is a state court loser complaining of a decision that was final, for which his appellate rights to the U.S. Supreme Court had expired, and he initiated this court case seeking what is in effect appellate review after those proceedings had become final.

[12] And in the complaint, Mr. Curry describes the SJC's decision disbarring him as the crux of his complaint seeking relief in this court. It is also clear that the relief he requests would of necessity require this court to review and potentially reverse the decision of the SJC disbarring him. The complaint requests, in part of its prayer for relief,

that his license to practice be reinstated in Massachusetts. It's hard to see how this court, respectfully, could do that without reviewing and reversing the SJC's decision.

So even though the Rooker-Feldman doctrine is smaller than it used to be, it's fully applicable to the facts of this case. As the Court suggested, the *Ruffalo* case does not compel a different result. That case, as you pointed out, your Honor, dealt with the Supreme Court's superintendent's power over a federal court's decision about an attorney's license to practice in federal court. That was not a direct appeal or an appeal on petition for writ of certiorari from a state court. And the court made -- went to the lengths to make clear that it was not reviewing or reversing the decision of the State Supreme Court with respect to that lawyer's license to practice in the state.

So the First Circuit has mentioned the *Ruffalo* case, being a case called *In Re: Williams*, where they acknowledge that they -- that that court -- that the *Ruffalo* decision might provide a basis upon which to alter a disciplinary sanction in [13] federal court but that it would -- that Rooker-Feldman doctrine would still preclude a federal district court or federal circuit court from reviewing the decision of the highest state court with respect to --

THE COURT: What about Miss Curry's request that she be allowed to amend to basically object to the disqualification of Mr. Curry from the practice of law in the federal court?

MR. CASEY: Well, your Honor, I think that amendment would be futile in this case because if Judge Young, in fact, barred Mr. Curry from practicing before -- in the federal district court, then Mr. Curry's recourse, if any, would be to the First Circuit, not to this court. And permitting an amendment to make a claim like that would seem to be futile, your Honor.

THE COURT: Thank you, Mr. Casey. Do you wish to have any rebuttal --

MS. CURRY: Very briefly.

THE COURT: -- Miss Curry?

MS. CURRY: Just as to my brother's last comment, and that was this "futile amendment." I was not a part of the case before Judge Young. I've just come into it, actually. But my memory is that that was a motion hearing before the Court, and then the Court took whatever action it took, unfortunately.

It seems to me, though, that Mr. Curry has a right to a full hearing on whether or not he would be allowed to, after [14] 40 years of practice, with no mark against his good name, his reputation as an attorney, under these facts, be allowed to have a full hearing before a district court to assess whether or not he would be fit to continue his practice in this particular court.

THE COURT: Did he move for such a hearing before Judge Young when that matter was before him with respect to his disqualification in federal court?

MS. CURRY: I'm afraid that I don't understand that question, your Honor.

THE COURT: Well, you said that, as far as you understood, Judge Young had disqualified --

MS. CURRY: Correct.

THE COURT: -- Mr. Curry from practicing. Did Mr. Curry, or you on his behalf, move to reconsider that disqualification or for an oral hearing before Judge Young?

MS. CURRY: I believe that prior counsel had a very brief hearing before Judge Young.

THE COURT: So what you're suggesting to me now is that that wasn't sufficient and that he's entitled to another one?

MS. CURRY: I'm suggesting to the Court that I think that he -- given the time facts of this case, that he has -- because it's an unusual case, as I tried to point out earlier, that he has a right to a full hearing, whether that be a full [15] hearing involving witnesses -- I don't think the court in Judge Young's session had the full record before it. My memory -- again, I wasn't counsel. But my memory was that the decision came down, and then there was a motion before Judge Young to continue his practice here, and that was -- that was an adverse decision, unfortunately. But I don't think that it ever amounted to really a full hearing.

And given the seriousness of this, given the unusual pattern of this case, given what I've tried to point out and when I tried to answer your earlier questions, your Honor, given the fact that there were -- and the record is replete with it -- constitutional violations of Mr. Curry for not getting -- when the decision reached was in the other court, the SJC. I'm at a loss to understand why this could not be done. Why couldn't he have a full hearing on this issue?

THE COURT: Why didn't your client seek a writ of certiorari to the United States Supreme Court within one year of the Supreme Judicial Court? That was his remedy.

MS. CURRY: Well, I believe that -- while I can't specifically speak to it, I believe that the feeling was that the remedy was not barred by Rooker-Feldman to come into this court.

And the other decision -- the other statement I'd just like to make – you've been very patient with me. I appreciate it -- is that *Ruffalo* has been decided supreme law for roughly [16] 60 years, I think. And I was trying to make an analogy in my mind. If there's a violation of a Miranda warning, do you run back to Supreme Court? Or do you say, well, this is the law? It's been decided. And now we'll take it to the court that should hear it. I think that was the way of thinking in my mind. So I don't think it was ripe for a writ of certiorari in the Supreme Court. I think it was ripe for a hearing in this court.

THE COURT: Thank you, Miss Curry. I am going to

allow the motion of the Supreme Judicial Court members and the Attorney General to dismiss this case. As I think I've indicated before, under the Rooker-Feldman doctrine, the jurisdiction of federal district courts is strictly original. The Supreme Court of the United States is the only court that may review challenges to state court decisions in cases arising out of judicial proceedings even if those challenges allege that the state court's action was unconstitutional. A federal district court must dismiss a complaint where the issues presented are "inextricably intertwined" with the questions previously adjudicated by a state court.

Mr. Curry asks this court to reinstate his law license, which would require this court to review and overturn the Supreme Judicial Court's decision on that exact issue. This is precisely what the Rooker-Feldman doctrine prohibits. As the United States Supreme Court made clear in *Exxon, Mobil,* [17] a district court lacks subject matter jurisdiction over "a case brought by a state court loser complaining of injuries caused by a state court judgment rendered before the district court proceedings commenced and inviting district court review and rejection of that judgment."

That is the case here; and, therefore, this court allows the defendant's motion to dismiss without prejudice to the plaintiff's filing whatever papers he or she thinks are appropriate.

Thank you, counsel.

MS. CURRY: Your Honor, not to interrupt you or belabor this, my question about amending the complaint, I take it that's not going to be allowed either?

THE COURT: Well, I'm not foreclosing you from anything you feel is appropriate. But it does seem to me that what Mr. Casey says is correct, that any further appeal to this session of this court would be futile because the appropriate recipient of an appeal of a decision by another district court judge is the United States Court of Appeals for the First Circuit.

MS. CURRY: Thank you very much, your Honor.

THE COURT: You're welcome.

MR. CASEY: Thank you, your Honor.

(Whereupon, at 3:02 p.m. the hearing concluded.)

[18] C E R T I F I CAT E

I certify that the foregoing is a correct transcript of the record of proceedings in the above-entitled matter to the best of my skill and ability.

/s/ Cheryl Dahlstrom 10/13/2010

Cheryl Dahlstrom, RMR, CRR Dated

Official Court Reporter

APPENDIX D — RELEVANT STATUTE, CIVIL RIGHTS ACT OF 1871

Civil Rights Act of 1871
From Wikipedia, the free encyclopedia

The **Civil Rights Act of 1871** is a federal law in force in the United States. Several of its provisions still exist today as codified statutes, but the most important still-existing provision is **42 U.S.C. § 1983**. The Act was originally enacted a few years after the American Civil War, along with the 1870 Force Act. One of the chief reasons for its passage was to protect southern blacks from the Ku Klux Klan by providing a civil remedy for abuses then being committed in the South. The statute has been subject to only minor changes since then, but has been the subject of voluminous interpretation by courts.

Contents

- 1 The statute
- 2 History
  - 2.1 Legislation
  - 2.2 Use during Reconstruction
  - 2.3 Later uses
- 3 Notes
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Appendix D

The statute

The statute reads:[1]

> Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, Suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Section 1983 essentially made equitable relief available to those whose constitutional rights had been violated by an actor acting under State authority. Normally constitutional rights violations are remedied by specific performance including injunctions by the courts.

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1. Ross, Darrell L. (2003). *Civil Liability in Criminal Justice Third Edition.* Anderson Publishing Co.

For example, if a person's right to due process was violated by a prison guard who was said to be acting under the authority of the state, then that person could bring suit for monetary damages against the prison guard. Without Section 1983, that person would have to seek an injunction by the courts for the due process violation. The problem with such an action by the court is that injunctions cannot apply to past harm, only future harm. So, essentially the person would have an actionable cause-the constitutional violation-with no adequate remedy. Most Section 1983 claims are brought against prison officials by prisoners, but prisoner claims are usually dismissed as being without merit. Claims can be brought by anyone stating a proper cause of action.

For most of its history, the Act had very little effect. The legal community did not think the statute served as a check on state officials and few cases were brought under the statute.

* * *

Although some provisions were ruled unconstitutional in 1882, the Force Act and the Klan Act have been invoked in later civil rights conflicts, including the 1964 murders of Chaney, Goodman, and Schwerner; the 1965 murder of Viola Liuzzo; and in *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993), in which the court ruled that "The first clause of 1985(3) does not provide a federal cause of action against persons obstructing access to abortion clinics."

Appendix D

It was also utilized in the 1969 case of *Tinker v. Des Moines*. By the time Beth Tinker was in school, the law had expanded to make even school boards liable if they stood in the way of people's federally-protected rights.

Today, the Civil Rights Act can be invoked whenever a state or local government official violates a federally guaranteed right. The most common use today is to redress violations of the Fourth Amendment's protection against unreasonable search and seizure. Such lawsuits concern false arrest and police brutality, most notably in the Rodney King case.

The Act was invoked in the 2010 *Robbins v. Lower Merion School District* case, where plaintiffs charged two suburban Philadelphia high schools secretly spied on students by surreptitiously and remotely activating webcams embedded in school-issued laptops the students were using at home, violating their right to privacy. The schools admitted to secretly snapping over 66,000 webshots and screenshots, including webcam shots of students in their bedrooms.[4, 5]

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4. Doug Stanglin (February 18, 2010). "School district accused of spying on kids via laptop webcams". *USA Today*. http://content.usatoday.com/communities/ondeadline/post/2010/02/school-district-accused-of-issuing-webcam-laptops-to-spy-on-students/1. Retrieved February 19, 2010.

5. "Initial LANrev System Findings", LMSD Redacted Forensic Analysis, L-3 Services — prepared for Ballard Spahr (LMSD's counsel), May 2010. Retrieved August 15, 2010.

Appendix D

External links

- Full text of the Klan Act of 1871 (simplified version)

- Text of Civil Rights Act of 1871 as codified - 42 U.S. Code 21 §§ 1983, 1988

- 18 U.S.C. § 242 is "the criminal analog of 1983."

Retrieved from "http://en.wikipedia.org/wiki/Civil_Rights_Act_of_1871"

Categories: United States federal civil rights legislation | United States federal criminal legistation | Sovereign immunity in the United States